No. 97-1598

In The
Supreme Court of the United States
October Term, 1997

NORTHERN CIRCUIT SERVICES, INC., *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE THORN APPLE VALLEY, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

PAGE

Motion For Leave To File Brief of Amicus Curiae Thorn Apple Valley, Inc., in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit 1

Brief of Amicus Curiae Thorn Apple Valley, Inc., in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit 5

No. 87-1598

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

NORTHERN GROUP SERVICES, INC., *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE, THORN APPLE VALLEY, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Thorn Apple Valley, Inc., respectfully moves for leave to file the accompanying brief of *amicus curiae* in support of the petition for writ of certiorari.

(1) Thorn Apply Valley, Inc. ("TAV"), is a Michigan-based meat packing company. It employs approximately 2,500 employees at production facilities located in Michigan and North Carolina, and at various sales and distribution facilities located in these and approximately 10 other states. Having annual sales of in excess of $500 million, TAV's effect upon interstate commerce is clear and significant.

(2) Virtually all employees of TAV, in all states in which it employs employees, are covered under one of approximately 15 self-insured and self-administered medical benefits plans sponsored by TAV. Most of these plans were the product of collective bargaining. All of them provide that when a plan beneficiary is involved in an automobile accident and has automobile insurance coverage available, "the auto insurance carrier will be primary."

(3) TAV's plans are and have been extensively involved in litigation in Michigan state courts with Michigan automobile insurance carriers over claims by the carriers for reimbursement from the plans for the carriers' payment of auto accident-related medical benefits to plan beneficiaries. These claims have been brought by the carriers under Michigan's common law of subrogation. In this litigation, TAV has contended, *inter alia*, that the carriers' reimbursement claims against the plans are preempted by ERISA.

(4) The claims which respondents threatened to bring against petitioners, and which caused petitioners to seek declaratory and injunctive relief from the district court, are identical to the claims that the automobile insurance carriers have brought and are bringing against TAV. The claims themselves, not merely the statutory policy arguments supporting the insurance carriers' interpretation of how the claims should be resolved, are directly preempted by ERISA. Petitioner does not, however, directly urge that the underlying threatened claims themselves are preempted, apart from its contention that the Michigan doctrines of construction which will be invoked to resolve those claims are preempted.

(5) ERISA's preemption of the claims which respondents threatened to bring against petitioners is clear under this Court's recent decision in *Pilot Life Insurance Co.* v *Dedeaux*, 481 U.S. ____, 95 L.Ed.2d 39, 107 S.Ct. 1549 (1987). This fact is directly relevant to the disposition of this case.

(6) TAV has sought and was refused consent by respondents to file the accompanying brief of *amicus curiae*. Nonetheless, TAV respectfully submits that the significant issues raised in the accompanying brief, which have not been presented by the parties, warrant this Court's consideration.

Respectfully submitted,

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Dated: April 25, 1988

No. 87-1598

In The
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October Term, 1987

NORTHERN GROUP SERVICES, INC., *et al.*,
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STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.*,
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BRIEF OF AMICUS CURIAE THORN APPLE VALLEY, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
ARGUMENT	3
SUMMARY OF ARGUMENT	6
CONCLUSION	7

INDEX OF AUTHORITIES

	Page
CASES	
Auto Club Insurance Association v. *Frederick & Herrud, Inc.*, 145 Mich. App. 722, 377 N.W.2d 902 (1985)	4
Detroit Automobile Inter-Insurance Exchange v. *Detroit Mutual Automobile Insurance Co.*, 337 Mich. 50, 59 N.W.2d 80 (1953)	5
Federal Kemper Insurance Co. v. *Health Insurance Administration, Inc.*, 424 Mich. 537, 383 N.W.2d 590 (1986)	4
Kelly v. *Kelly*, 54 Mich. 30, 19 N.W. 580 (1984)	5
Metropolitan Life Insurance Co. v. *Massachusetts*, 471 U.S. 724, 739–740 (1985)	3
Metropolitan Life Insurance Co. v. *Taylor*, 481 U.S. ___, 95 L.Ed.2d 55, 107 S.Ct. ___ (1987)	3, 6
Pilot Life Insurance Co. v. *Dedeaux*, 481 U.S. ___, 95 L.Ed.2d 39, 107 S.Ct. 1549 1987	3, 6
STATUTES:	
Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144, Section 514, 29 U.S.C. § 1144(a), 29 U.S.C. § 1144(b)(2)(A), 29 U.S.C. § 1144(b)(2)(B)	*passim*
Labor Management Relations Act, 1947, 29 U.S.C. § 141, *et. seq.*	2
McCarran-Ferguson Act, 15 U.S.C. § 1011 *et. seq.* (1982)	3
Michigan No-Fault Automobile Insurance Act, M.C.L.A. § 500.3101 *et. seq.*	2, 4

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Respondents.

BRIEF OF AMICUS CURIAE THORN APPLE VALLEY, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTEREST OF AMICUS CURIAE

Thorn Apple Valley, Inc. ("TAV"), employs approximately 2,500 employees in its meat processing and distributing operations in Michigan, North Carolina and approximately 10 other states. TAV sponsors in excess of 15 self-insured[1] and self-administered medical plans which cover virtually all of these employees. Most of TAV's plans, covering the majority of its employees, were the product of collective bargaining between TAV and labor organizations representing appropriate bargaining units of TAV's nonsupervisory employees. All of TAV's plans contain coordination of benefits clauses which, similar to petitioners' plans, provide that whenever a plan beneficiary is involved in an automobile accident and has automobile insurance coverage available "the auto insurance carrier will be primary."

TAV and its plans have been involved extensively in litigation with numerous Michigan automobile insurance car-

[1] TAV's medical plans carry aggregate stop loss coverage.

riers, including most of the respondents.[2] In this litigation, the claims which respondents threatened to bring against petitioners were actually pursued against TAV or its plans in the Michigan courts. Typically, in these cases, the auto carrier has paid medical benefits to or on behalf of a beneficiary of one of TAV's plans, the plan has declined to reimburse the carrier for the benefits and the carrier has then sued TAV (or the plan) in state court for reimbursement for those payments, claiming rights against the plan under the Michigan common law of subrogation. In the course of litigating these subrogation claims, the carriers have invoked the same state law policies purportedly emanating from Michigan's No-Fault Automobile Insurance Act, M.C.L.A. § 500.3101 *et. seq.*, that were considered by the Sixth Circuit below. TAV has urged that because the carriers' claims "relate to" an employee benefit plan the claims are themselves preempted by ERISA.

TAV's interest in the disposition of this petition derives not only from its involvement in state court litigation presenting questions regarding the scope of ERISA preemption which are identical to those decided by the Sixth Circuit, but also from the fact that the Sixth Circuit's decision fails to consider or address the nature of the claims which although only threatened against petitioners have in fact been brought and litigated in the Michigan courts against TAV. The state court litigation in which TAV has been involved represents the precise procedural context in which petitioners' ERISA preemption arguments would have been presented had petitioners not chosen to commence their action for declaratory and injunctive relief in the district court. TAV's interests are also vitally affected by this petition inasmuch as the Sixth Circuit's decision substantially subverts the administration of TAV's fringe benefit plans most of which, unlike petitioners' plans, were the product of collective bargaining under the Labor Management Relations Act. 29 U.S.C. § 141, *et.seq.*

[2] TAV is or has been involved in litigation of this type with State Farm Mutual Insurance Company, Auto Club Insurance Association, Farmers Insurance Exchange and Allstate Insurance Company.

ARGUMENT

Review is warranted in this case because the Sixth Circuit's decision directly conflicts with this Court's decision last term in *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. ____, 95 L.Ed.2d 39, 107 S.Ct. 1549 (1987). By failing to consider the nature of claims threatened by respondents, which prompted petitioners to commence this action in the district court in the first place, the Sixth Circuit unnecessarily reached and erroneously decided complex and abstract questions concerning the interpretation of ERISA's preemption, "insurance savings" and "deemer" clauses, provisions which this Court has previously observed are "not a model of legislative drafting." *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 739-740 (1985).

This Court succinctly ruled in *Pilot Life* that state common law tort and contract claims brought against ERISA plans, even insured ERISA plans, are preempted by ERISA. See also *Metropolitan Life Insurance Co.* v. *Taylor*, 481 U.S. ____, 95 L.Ed.2d 55, 107 S.Ct. ____ (1987). The Court reasoned that such lawsuits seeking to challenge the administration of ERISA plans "relate to" those plans within the meaning of ERISA's express preemption clause. 29 U.S.C. § 1144(a). The Court also rejected the contention that such state law claims were "saved" from preemption because they "regulate insurance" under ERISA's "insurance savings" provision. 29 U.S.C. § 1144(b)(2)(A). Applying definitional criteria fashioned under the McCarran-Ferguson Act, 15 U.S.C. §1011 *et. seq.*, for determining whether a practice constitutes the "business of insurance," the Court concluded that the Mississippi tort and contract claims which were there at issue and which had been asserted against an insured disability plan provided by a Mississippi employer had "roots-...firmly planted in the general principles of Mississippi tort and contract law." Thus, the Court held, these common law claims were not specifically directed at the insurance industry and were not saved from preemption by the "insurance

savings" clause. The Court reached this conclusion notwithstanding the fact that most contemporary applications of these Mississippi claims apparently had involved plaintiffs seeking "punitive damages from insurance companies for failure to pay a claim under an insurance contract." Having rejected arguments under the "insurance savings" provision, the Court declined to reach the more subtle implications of ERISA's "deemer" clause. 29 U.S.C. § 1144(b)(2)(B).

The same analysis used by the Court in *Pilot Life* could and should have been used by the Sixth Circuit here. Petitioners commenced this action in the district court because respondents had threatened to bring claims against them for restitution for benefits paid by respondents to beneficiaries under petitioners' plans. The threatened claims against petitioners are identical to the claims which have been actually brought by numerous insurance carriers, including most of the respondents, against TAV and its plans. These claims are predicated on the Michigan common law of subrogation. Having invoked the Michigan courts' jurisdiction to resolve these subrogation claims against TAV, the insurance carriers have then proceeded, successfully in some cases, to urge that policy emanations from Michigan's No-fault Automobile Insurance Act, M.C.L.A. 500.3101 *et. seq.*, require that the coordination of benefits provisions in their insurance policies prevail over the conflicting coordination of benefits provisions in TAV's ERISA plans. See, e.g., *Auto Club Insurance Association* v. *Frederick & Herrud, Inc.*, 145 Mich. App. 722, 377 N.W.2d 902 (1985).[1] In this regard, no case law holds that Michigan's no-fault insurance legislation independently creates a cause of action for restitution between an automobile insurance carrier and an employee benefit plan, whether insured or uninsured. The reported cases resolve only the question of priority between conflicting policy provisions where the issue of priority alone has been litigated. *Id.*; see also *Federal Kemper Insurance Co.* v. *Health Insurance Administration, Inc.*, 424 Mich. 537, 383 N.W.2d 590 (1986).

[1] TAV was formerly known as Frederick & Herrud, Inc.

The common law subrogation claims on which the Michigan courts' adjudications of "priority" disputes between insurance carriers and health benefit plans are premised is not, however, a doctrine limited to the insurance industry or to "insurance law." Rather, as with the Mississippi tort and contract doctrines deemed preempted in *Pilot Life*, Michigan's subrogation doctrine was formulated in noninsurance cases. E.g., *Kelly* v. *Kelly*, 54 Mich. 30, 19 N.W. 580 (1884). Only years later has it been adapted to resolve priority disputes between insurance companies. See, e.g., *Detroit Automobile Inter-Insurance Exchange* v. *Detroit Mutual Automobile Insurance Co.*, 337 Mich. 50, 59 N.W. 2d 80 (1953).

Had the Sixth Circuit properly considered the nature of the common law subrogation claims threatened by respondents against petitioners before plunging into its exhaustive analyses of Michigan's no-fault litigation and ERISA's preemption provisions, it need never have reached the abstractions posed by the court in the first paragraph of its opinion. Thus, regardless of whether or not ERISA preempts Michigan's No-Fault Automobile Insurance Act, to the extent that Act allows automobile insurers in Michigan to issue policies which conflict with ERISA plans — as the issue was posited by the Sixth Circuit — the claims initially threatened by respondents against petitioners arise under the Michigan common law doctrine of subrogation, not under Michigan's insurance laws. These claims are for this reason preempted by ERISA. They plainly "relate to" petitioners' ERISA plans and do not arise under any "law of any state which regulates insurance." 29 U.S.C. § 1144(b)(2)(A). Accordingly, in view of this Court's holding in *Pilot Life*, there was no need for the Sixth Circuit to address the applicability of the "deemer clause," or to engage in a comprehensive balancing the national interest in uniform administration of employee benefit plans against policies favoring state primacy in the regulation of insurance.

SUMMARY OF ARGUMENT

Review in this case is warranted because the Sixth Circuit erroneously and needlessly decided abstract questions of law after sidestepping the controversies which initially caused petitioners to invoke the district court's jurisdiction. The claims which respondents threatened to bring against petitioners arise under Michigan's common law of subrogation. They do not arise under Michigan's No-Fault Automobile Insurance Act or under other insurance laws. Policies emanating from Michigan's no-fault legislation have been invoked merely to support respondents' interpretation of how their subrogation claims should ultimately be decided. Nevertheless, the initial common law subrogation claims threatened by respondents against petitioners are no different than the common law tort and contract claims this Court held were preempted by ERISA in *Pilot Life Insurance Co.* v. *Dedeaux* and in *Metropolitan Life Insurance Co.* v. *Taylor*.

CONCLUSION

For the foregoing reasons, in addition to those urged by petitioner, the petition for writ of certiorari should be granted.

Respectfully submitted,

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